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No. 99-370

In the
Supreme Court of the United States

JOHNNIE LEE EVANS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review petitioner's claim that his constitutional rights were violated because his trial attorneys did not present mitigating evidence of an extreme mental or emotional disturbance sufficient to preclude a sentence of death.

Whether this Court should grant certiorari to review petitioner's claim that his constitutional rights were violated because his trial attorneys did not present certain evidence of non-statutory mitigating factors.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at *People v. Evans*, 186 Ill. 2d 83, 708 N.E.2d 1158 (1999). A copy of the opinion is contained in the Appendix to the Petition.

STATEMENT

I. The Trial

After a jury trial before the Honorable Joseph Urso, petitioner Johnnie Lee Evans was convicted of the 1983 murder and attempt rape of 16-year-old Adrian Allen. (TCR 3406) At trial, the People presented evidence showing that petitioner attacked three different women on elevators in Chicago Housing Authority ("CHA") apartment buildings during the week of January 16, 1983: Annie Webb, Maeline Mitchell, and the murder victim, Adrian Allen. Petitioner made statements to the police admitting that he attacked all three women. (TR 2034-2167) Both Annie Webb and Maeline Mitchell testified at trial. (TR 1935-40; 2002-15)

On January 22, 1983, two children discovered Adrian Allen's body in the elevator of a CHA apartment building at 3547 South Federal in Chicago. (TR 1700) Detective Robert Evans arrived to investigate and found a black female lying face down in the elevator, with her undergarments and jeans around her ankles. (TR 1686-88) A ski jacket, sweaters, and a bra were pushed up above her breasts. (TR 1690) There was a quantity of blood on the floor and smatterings of blood on the walls. (TR 1688) Crime lab Officer James Frankenbach viewed Adrian's body in the elevator and noted

that she had been stabbed repeatedly and there was blood all over the elevator. (TR 1735-37) The detectives recovered a red-stained coat liner from a garbage can on the 17th floor. (TR 1692)

The medical examiner testified about the victim's injuries. There were 17 stab wounds and 5 incised wounds, all of which could have been made with a knife. (TR 1657) There were several wounds to the chest and abdomen and additional wounds to the face and neck. (TR 1642-46) One of these wounds was particularly deep—it cut the windpipe and grooved the front of the spine—and another severed the anterior half of the jugular vein. (TR 1643-44, 1646)

Petitioner confessed his involvement in the murder of Adrian Allen in three separate statements. After petitioner's second statement, Detective Markham called for a felony review assistant State's Attorney, who interviewed petitioner and took a court-reported statement from him. (TR 1811-12) Petitioner said that when he pushed the stop button on the elevator, the victim "jumped" him and grabbed him around the neck, screaming. Petitioner pulled out a knife and told the woman to "be cool," that he intended to get off the elevator. The two fought over the knife and "tussled" when the knife fell to the floor. (TR 2127) The victim then told petitioner to do what he was going to do and get it over with, and she pulled down her pants. Petitioner said that before he could "get any—get ready to do anything," someone outside yelled for the elevator, and the victim "went berserk," screaming and struggling for the knife. Petitioner said that the victim was taller than him, and he pushed her back with the knife and cut her; he said that he did not know how many

times he stabbed her. (TR 2128) After the victim fell, petitioner "unstuck" the elevator and got off. He panicked when he noticed that his coat had blood on it, so he took the coat off and put the liner in the 16th floor garbage can and the coat in a can on the 15th floor. Petitioner went home, but then returned to the building and considered calling the police. (TR 2130) He decided not to call the police because he did not want to have to explain himself. (TR 2131) He eventually saw police on the 12th floor. (TR 2131)

Petitioner said that when he got on the elevator, he "didn't have anything in [his] mind." (TR 2134) He was on his way to see a woman on the 16th floor, and he was not paying much attention to the victim or the other man on the elevator. He explained, "So, I didn't have no intention to do anything, you know. But then when the man got off the elevator, you see what I'm saying, there it was, you know." (TR 2135)

The jury found petitioner guilty of murder and attempt rape, and the case proceeded to a death penalty hearing. (TR 2457-60)

II. Death Penalty Hearing

The trial court found petitioner eligible for the death penalty because he was over the age of 18, had killed Adrian Allen during an attempt rape, and had killed her with the knowledge and intent that his actions would cause death. (TR 2614) Therefore, the case proceeded to the aggravation/mitigation phase of the death penalty hearing.

***Aggravation*:**

In aggravation, the People presented the testimony of three other women petitioner had raped. Ruby Coleman Fitzpatrick testified that petitioner raped her in an elevator at 3547 South Federal on January 14, 1975. (TR 2620-28) Tina Yancy Williams testified that petitioner raped her in an elevator at 3617 South Federal on March 11, 1974; however, charges based on this incident were later dismissed. (TR 2659-62) Gail Carroll testified that petitioner raped her in an elevator at 3653 South Federal on May 12, 1978. During the attack, petitioner threatened that if she did not stop crying he was going to stick her 22 times because his knife was too small to kill her with one stab. Gail could hear petitioner flicking the knife. After the attack, petitioner sent Gail three or four letters, one including what she described as a "dirty picture." Petitioner also called her house collect from the county jail, and after he was convicted and sentenced for raping her, he sent a letter to her from the Joliet Correctional Center. (TR 2763-87)

Diane Smith testified that she met petitioner through his brother and the following day, petitioner came to her apartment and told her to put her kids to bed and have sex with him. When she told him to leave, he grabbed her around the neck and pulled out a knife. She struggled loose and grabbed her own knife, and her mother called the police. They struggled some more, as petitioner continued refusing to leave and threatening her with the knife. Petitioner returned the next day, and Diane subsequently signed a complaint against petitioner. (TR 2708-21)

Dr. Edmund Donoghue, the medical examiner who performed the autopsy on Adrian Allen, testified that Adrian was five months' pregnant at the time she was murdered; however, the pregnancy was not visible externally and he did not discover it until he conducted his internal examination. (TR 2647-50)

***Mitigation*:**

In mitigation, petitioner testified on his own behalf and also presented the testimony of a clinical psychologist. Petitioner gave a detailed description of his childhood. (TR 2816) Petitioner was abandoned by his mother when he was an infant and lived most of his childhood with his great-aunt, Bessie. (TR 2816-19) Bessie was a migrant farm worker, and they lived in several different homes with various families. (TR 2818-20) Petitioner testified that he was treated as an outcast and felt as though no one wanted him. (TR 2819)

Petitioner first attended school at the age of 7, but only stayed in school for half the term, and then he went into the hospital to have his left eye removed. (TR 2824) Petitioner began second grade when he was 9 years old, and he continued through eighth grade. (TR 2825) When petitioner was 14 years old, he learned that Bessie was getting welfare money for him, and he asked for some of it. (TR 2828) Petitioner and Bessie had an argument, and Bessie told petitioner that she was going to send him to live with his mother. (TR 2828-29)

When petitioner was 14 years old, he took a train from New Jersey to Chicago to live with his mother. (TR 2930) Petitioner's mother lived in a 3-bedroom

house on Princeton with petitioner's three sisters, two brothers, and petitioner's aunt and her six children. (TR 2834)

Petitioner testified that he was sexually assaulted by a stranger when he was fourteen. (TR 2846-48) Petitioner never told anyone about this until he was interviewed by a psychologist in preparation for the sentencing hearing. (TR 2849)

Petitioner joined the Job Corps when he was 16 years old. (TR 2853) He testified that he was the victim of sexual harassment while he was there, and was forced to have sex with "certain dudes." (TR 2853) At first, petitioner did not tell the counselors because he thought that there would be retaliation if he did so. (TR 2856) He later told a supervisor that he was being sexually harassed; however, petitioner refused to give any names, and therefore, the supervisor said that there was nothing he could do. (TR 2863)

When petitioner returned to the projects where his mother lived, she made him a "pallet" to sleep on because there was no bed for him. (TR 2866) Petitioner's mother got him a job at Evanston Hospital unloading food carts. Petitioner did not get along with one of the other workers, David Boxtail, who was the chief gang leader of the Disciples street gang. (TR 2868) Petitioner and Boxtail got into a fight, and when Boxtail told his supervisor, petitioner was told to quit, so he did. (TR 2869)

Petitioner married Betty Clanton in 1972, when he was 18 years old, and fathered two children. (TR 2875-76) While petitioner was in prison his wife lost custody of the children, and petitioner was unable to regain custody of them because he was in jail. (TR 2878)

Petitioner admitted committing all of the rapes with which he was charged, except for the rape of Tina Yancy. (TR 2880, 2882) As for the other victims, petitioner said that he "didn't mean to rape them women," and said that he did it because of "need of affection." He said that he raped them to prove that he was a man, because he wanted somebody to love him. (TR 2880) Petitioner said that he had a conversation with each of his victims, because he was trying to explain himself. (TR 2881)

Petitioner made a lengthy statement in allocution (TR 2896-2904), in which he denied his guilt: "And I'm still not saying that I did anything . . . ." (TR 2904) On cross-examination, petitioner continued to deny his involvement in Adrian Allen's death. (TR 2906) Petitioner said that he made the statement to the police to protect his family. (TR 2912) Petitioner said that Ruby Coleman and Gail Carroll were the only two women he ever tried to rape; however, he then admitted raping Loretta Brown. (TR 2914) Petitioner denied writing any letters to Paula Banks, but acknowledged that the Islamic name and prison identification number on the envelope were his. (TR 2915-17)

Petitioner testified that he wanted to plead guilty to murdering Adrian Allen and take a natural life sentence, even though he had nothing to do with the crime. (TR 2937) Petitioner could not say where he was at the time of the murder; however, he denied ever wearing the coat liner found at the scene, and said that it did not belong to his brother. (TR 2938) Petitioner claimed that all of the blood on his clothing and shoes had come from a small cut on his thumb which he suffered while he was washing dishes. (TR 2940)

When asked whether he felt the same need for affection at the sentencing hearing that he felt when he raped those three women, petitioner replied, "One would always feel lonely. We would always feel the need." (TR 2947) However, petitioner then said that he did not have a need to rape any more women. (TR 2948) Petitioner said that he did not have a bad temper, and he described himself as "easy going" and not violent. (TR 2959) Petitioner said that he considered rape to be a violent crime, but added, "And it all depends on how the act was committed." (TR 2960) He did not believe that the rapes of Loretta Brown, Ruby Coleman and Gail Carroll were violent crimes. (TR 2960)

Dr. Alan K. Rosenwald, a clinical psychologist, testified as an expert for the defense. (TR 2966, 2970). Dr. Rosenwald summarized his description of petitioner as "chronically a depressed human being who feels helpless, rejected, abandoned, unloved." (TR 2976) The doctor believed that there was some evidence of petitioner being "retarded psychomotor, on the psychomotor characteristic of a depressed person." (TR 2980) He explained that this meant that petitioner proceeds somewhat slowly in responding, which is not related to his general level of intelligence, but seems to be more of a slowdown as a result of his being depressed. (TR 2980) Dr. Rosenwald's data indicated that petitioner was obsessed with sexual thoughts and might have considerable difficulty in monitoring his sexual behavior. (TR 2982-83)

Dr. Rosenwald concluded that petitioner's repetitive history of rape was because petitioner was constantly seeking to affirm his own masculinity; the doctor be-

lieved that the rapes were an affirmation of maleness for petitioner. (TR 2990) He determined that "[a]ll of these things add up to a kind of psychopathology in the sexual area." (TR 2992) In summarizing his findings, Dr. Rosenwald described petitioner as a person of average intelligence who "leads a somewhat highly subjective life, whose capacity when emotional situations are not in play is able to conform his thinking to conventional standards." (TR 2992-93)

Dr. Rosenwald did not believe that petitioner did not understand what he was doing when he committed the rapes to which he admitted; however, he believed that petitioner did not see his acts of rape as violent. (TR 3002) He admitted that petitioner showed no remorse for the rapes he had committed. (TR 3008) Petitioner talked about being charged with murdering a woman, but said that he did not do it. (TR 3008) Dr. Rosenwald conceded that petitioner attempted to minimize his responsibility; he explained that because petitioner saw himself as a victim of society, he would not see himself as primarily responsible. (TR 3017)

When asked whether petitioner was acting under an extreme emotional or mental distress, the doctor responded: "Well if extreme is chronic, I have trouble with the term extreme. I think this is a long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress. That he has been chronically ill for many years." (TR 2993) Dr. Rosenwald testified that he was not asked to include in his report whether petitioner, at the time he committed the murder, was under the influence of an extreme emotional or mental disturbance. (TR 3029-30) He admitted, however, that he had

previously testified at a death penalty hearing, that he was aware of the factors in mitigation, and that he knew that one of those factors in mitigation was whether the petitioner committed the murder while he was under the influence of an extreme mental or emotional disturbance. (TR 3030) He said that he was told that the purpose of his examination was that the death penalty was being considered, but he was not told specifically to look for what particular circumstances might underlie that. (TR 3031) When asked a second time whether petitioner was under the influence of an extreme mental or emotional disturbance at the time of the murder, Dr. Rosenwald responded: "I believe, counsel, that referring back to the comments I made earlier, I indicated that it was highly probable that Mr. Evans was under emotional factors which could contribute to the crimes that he committed. That I questioned that I wasn't clear in my own mind what is meant by extreme." (TR 3031)

On cross-examination, Dr. Rosenwald conceded that petitioner did not suffer from any psychosis. He said that previous examinations by the Psychiatric Institute did not indicate that any psychiatrist or psychologist believed that petitioner suffered from a psychosis. (TR 2996-97) The predominant diagnosis in all the psychological reports dating back to 1969 was that petitioner was an antisocial personality. Dr. Rosenwald, however, disagreed with this diagnosis. (TR 3008) When asked whether he was informed of the purpose of the sentencing hearing, Dr. Rosenwald replied, "I was told to examine the petitioner, Mr. Evans, to evaluate him psychologically and possibly to make imprints backwards at the time that he committed the crime." (TR 2998)

Dr. Rosenwald testified that he believed petitioner would require lengthy periods of psychotherapy, but that there was a potential that he would respond to that. (TR 3036) He also stated, however, that without treatment, petitioner "is indeed a danger to society." (TR 3028)

The trial court found that there were no mitigating circumstances sufficient to preclude the imposition of the death penalty. The trial court specifically found "that the murder of Adrian Allen was not committed while [petitioner was] under the influence of an extreme mental or emotional disturbance, as it would preclude the imposition of the death penalty." (TR 3102) Accordingly, on June 11, 1984, petitioner was sentenced to death. (TR 3102) Petitioner was subsequently sentenced to 30 years' imprisonment on the attempt rape charge. (TR 3112)

On direct appeal, the Illinois Supreme Court remanded this case back to the trial court for the limited purpose of conducting a hearing into the question of racially motivated peremptory challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court conducted a *Batson* hearing and determined that petitioner had failed to make out a prima facie case of racial discrimination in the prosecution's exercise of peremptory challenges. The Illinois Supreme Court then addressed all issues raised in petitioner's direct appeal and ultimately affirmed his conviction in an opinion dated September 29, 1988. *People v. Evans*, 125 Ill. 2d 50, 530 N.E.2d 1360 (1988).

On June 27, 1990, petitioner filed a petition for post-conviction relief with the trial court, and on February

6, 1997, petitioner filed his amended petition for post-conviction relief. (CR 11) The State moved to dismiss petitioner's petition, and the trial court heard extensive arguments from both sides on the motion. (R D3-13) On May 17, 1997, the trial court dismissed petitioner's petition, finding that petitioner had failed to establish a substantial deprivation of his constitutional rights warranting post-conviction relief. (R E3-7; CR 186-94)

The Illinois Supreme Court affirmed the trial court's dismissal of petitioner's post-conviction petition in an opinion dated February 19, 1999. *People v. Evans*, 186 Ill. 2d 83, 708 N.E.2d 1158 (1999). Petitioner now asks this Honorable Court to review the ruling of the Illinois Supreme Court.

ARGUMENT

I.

PETITIONER'S POST-CONVICTION PETITION FAILED TO ESTABLISH THAT HIS TRIAL ATTORNEYS WERE INEFFECTIVE IN THEIR PRESENTATION OF MITIGATING EVIDENCE OF AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Petitioner asserts that the Illinois Supreme Court erred in affirming the trial court's dismissal of his post-conviction claim of ineffective assistance of counsel at sentencing. Petitioner contends that his counsel acted incompetently in failing to present evidence to establish the statutory mitigating factor that petitioner acted under an extreme mental or emotional disturbance at the time of the crime. *See* 720 ILCS 5/9-1(c)(2) (West 1996) (formerly Ill. Rev. Stat. 1983, ch. 38, par. 9-1(c)(2)). On the contrary, the Illinois Supreme Court properly re-

jected petitioner's claim where petitioner failed to show that his counsel was ineffective under the two-pronged test set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). There is no need for this Court to grant certiorari to review the Illinois Supreme Court's application of the *Strickland* standard in this case.

The standard for assessing whether an attorney's performance at a capital sentencing hearing was constitutionally deficient is that set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). As applied to death sentencing hearings, the *Strickland* standard requires petitioner to show: (1) that his attorney's performance at the hearing was deficient, as counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. *Strickland*, 466 U.S. at 687-88, 695.

In assessing counsel's performance a reviewing court must look to "not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794 (1987). The reviewing court presumes that counsel's challenged actions may have been sound trial strategy. *See Strickland*, 466 U.S. at 699 (counsel's decision to forgo a psychiatric evaluation presumed to be sound trial strategy, even though he later urged the sentencing judge to find the defendant had an extreme emotional disturbance). Further, "in all cases where the drawbacks of potentially mitigating evidence are obvious from the record, [the court] must presume that it was these drawbacks, and not merely

lack of diligence, which was behind counsel's decision." *People v. Caballero*, 126 Ill. 2d 248, 275, 533 N.E.2d 1089 (1989).

When the *Strickland* standard is applied here, it is evident that trial counsel's performance fell within the wide range of professionally competent assistance. Trial counsel developed a sentencing strategy to portray petitioner as the neglected and unwanted victim of an abusive childhood, who raped women in a misguided quest for love. Trial counsel obtained a psychological evaluation of petitioner by Dr. Alan Rosenwald, a psychologist with experience testifying in death penalty cases. Trial counsel elicited testimony from Dr. Rosenwald that petitioner had a "long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress," and that "it was highly probable that [petitioner] was under emotional factors which could contribute to the crimes that he committed." (TR 2993)

Petitioner claims that trial counsel was ineffective for failing to elicit specific testimony establishing the mitigating factor that petitioner was suffering from extreme mental or emotional disturbance at the time he committed the crime. It is important to note, however, that Dr. Rosenwald repeatedly testified that petitioner did not acknowledge to him that he had murdered Adrian Allen. Indeed, Dr. Rosenwald suggested that whether or not petitioner actually committed the crime was unimportant to his assessment of petitioner's psychological traits. (TR 2974, 3032, 3033) Yet, because petitioner did not acknowledge committing the crime, it certainly would have been difficult for Dr. Rosenwald to testify that petitioner committed the crime while suffering

from an extreme mental or emotional disturbance. Here, as in *People v. Sanchez*, 169 Ill. 2d 472, 662 N.E.2d 1199 (1996), petitioner took the witness stand during the sentencing hearing and denied that he killed Adrian Allen. (TR 2906) Under these circumstances, "[f]or counsel to have presented evidence of a mitigating mental state, as the defendant now suggests, would have been inconsistent with the theory of the defense." *Sanchez*, 169 Ill. 2d at 491. Thus, the Illinois Supreme Court observed, "A reasoned decision to make the best of a bad situation by pursuing a particular line of defense satisfies the constitutional minimum." *Evans*, 186 Ill. 2d at 96, *quoting Kokoraleis v. Gilmore*, 131 F.3d 692, 697 (7th Cir. 1997).

Furthermore, there is no reasonable probability that, absent counsel's alleged failure, the trial court would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *See Strickland*, 466 U.S. at 695. Prejudice must be assessed in a realistic manner based on the totality of the evidence. *People v. Coleman*, 168 Ill. 2d 509, 538, 660 N.E.2d 919 (1995). Accordingly, it is improper to focus solely on the potential mitigating evidence; the nature and extent of the evidence in aggravation must also be considered. *Coleman*, 168 Ill. 2d at 538.

Considering the evidence presented at sentencing, the totality of the aggravating and mitigating evidence, and the proposed mitigating evidence in Dr. Rosenwald's post-trial affidavit, there is no reasonable probability that, but for counsel's alleged error in not defining the statutory mitigating factors for Dr. Rosenwald, the death sentence would not have been imposed.

Initially, Dr. Rosenwald's post-trial conclusion that petitioner acted under an extreme mental or emotional disturbance at the time of the crime is dubious. Dr. Rosenwald first examined petitioner in May of 1984, more than a year after the crime. Furthermore, Dr. Rosenwald failed to consider the information in petitioner's confession, given two days after the murder. This information surely was the best evidence of petitioner's state of mind at the time of the crime; yet Dr. Rosenwald testified that he did not consider it important.

Petitioner's own statement indicates that there was no particular emotional trigger for his January, 1983 attacks on Annie Webb, Maeline Mitchell and Adrian Allen. On January 6, 1983, he happened to see Annie Webb and her two children waiting for an elevator. He followed them onto the elevator, jammed the elevator between floors, threatened Annie with karate sticks and raped her. (TR 1792-93) Two days later he happened to see Maeline Mitchell waiting for an elevator. Again, petitioner followed her onto the elevator, jammed the elevator between floors, threatened her with a knife, and raped her. (TR 1794-95) During his mitigation testimony, when asked why he chose elevators for the scene of his crimes, petitioner explained that it was "convenient," and remarked, "You know, you are going to commit no crime or whatever you do in the open or out there on the sidewalk. . . . I stopped the elevator to commit a crime." (TR 2926)

On January 22, 1983, petitioner again stopped the elevator to commit a crime. Petitioner was on the elevator with a man and a woman, and when the man got off the elevator, petitioner jammed the elevator between

floors and pulled a knife. (TR 1800) Notably, in his statements to the police and the Assistant State's Attorney, petitioner did not mention any stressful event that may have preceded this encounter. In fact, in more than one version of his statement, petitioner claimed that it was the victim, and not petitioner, who "went berserk," and that he had to stab her to protect himself. (TR 1809; 2128)

Petitioner's statement contains not even a hint of emotional disturbance. Instead, his statement demonstrates that he is a sexual predator who carefully orchestrates encounters with women in elevators because that is the most "convenient" place for him to rape them. Rather than claiming that he acted out of an emotional disturbance, petitioner said that when he got on the elevator, he "didn't have anything on [his] mind." (TR 2134) When the man got off the elevator, however, leaving petitioner with a prime criminal opportunity, as petitioner explained, "[T]here it was, you know." (TR 2135) Thus, petitioner's statement showed that, at the time of the crime, he was highly conscious of the improper nature of his actions and was able to reason well enough to plan his actions. Dr. Rosenwald's complete failure to consider this statement, or any of the facts of the crime, casts serious doubt on the validity of his conclusion.

In contrast to petitioner's proposed mitigation evidence, the trial court was faced with a great deal of compelling evidence in aggravation. Between March 11, 1974, and January 24, 1983, petitioner had been out of custody for a total of 71 days and had raped or tried to rape 8 different women, including the murder victim, Adrian Allen. (TR 3053-56) Tina Yancy testified that

petitioner raped her in an elevator with a knife on March 11, 1974. (TR 2654-62) Twenty days after petitioner was released from the county jail on the charges brought by Tina Yancy, he raped Loretta Brown in a CHA elevator. (TR 2915) One week later, he raped Ruby Coleman in a CHA elevator. (TR 2625-30) Petitioner was tried, convicted, and served time in the Illinois Department of Corrections. Only 9 days after his release from prison, petitioner raped Gail Carroll in a CHA elevator. (TR 2763-76) Once again, petitioner was tried, convicted, and served time in the Illinois Department of Corrections. When he was released this time, he began a crime spree. Only 24 days after his release from prison, petitioner raped Annie Webb in a CHA elevator. (TR 1934-64) The following day, petitioner brandished a knife and tried to rape Diane Smith. (TR 2708-12) The day after that, petitioner raped Maeline Mitchell in a CHA elevator. (TR 1996-2015) Four days later, petitioner killed Adrian Allen after attempting to rape her in a CHA elevator. (TR 2126-35)

The People presented additional evidence in aggravation showing that petitioner's prison behavior was far from exemplary. The overwhelming evidence in aggravation shows that the trial court's sentencing decision would have been the same even if Dr. Rosenwald had given the specific testimony contained in his affidavit. Most importantly, the trial court's order dismissing petitioner's post-conviction petition demonstrates that petitioner's proposed mitigation evidence would have had no impact at all on the trial court's sentencing decision. The judge who originally sentenced petitioner also ruled on his post-conviction petition, and that judge reviewed the mitigation evidence now presented and

clearly ruled that it would not have changed his mind about petitioner's sentence. (R C193) The trial judge made it clear that, with or without the additional evidence contained in petitioner's post-conviction petition and supporting affidavits, he would have sentenced petitioner to death.

In sum, petitioner cannot demonstrate that his trial counsel acted incompetently in failing to elicit specific testimony from Dr. Rosenwald that petitioner murdered Adrian Allen while suffering from an extreme mental or emotional disturbance, nor can he demonstrate prejudice from his counsel's actions. Accordingly, the Illinois Supreme Court properly affirmed the trial court's order dismissing petitioner's post-conviction claim of ineffective assistance of counsel.

II.

PETITIONER'S POST-CONVICTION PETITION FAILED TO ESTABLISH THAT HIS TRIAL ATTORNEYS WERE INEFFECTIVE IN THEIR PRESENTATION OF NON-STATUTORY MITIGATING FACTORS.

In his second contention, petitioner claims that his trial attorneys were ineffective in failing to present evidence of additional, non-statutory mitigating factors. In support of this claim, petitioner attached to his post-conviction petition affidavits from a social worker, Arlene Messner-Peters, and a clinical psychologist, Gerard Girdaukas. Ph.D. (App. 30-62) According to petitioner, these affidavits establish that if his trial counsel had performed competently, they would have presented evidence of his physical, sexual and emotional abuse during his childhood, as well as his impaired brain functioning. (Pet. 25)

Petitioner's current claim, like his Argument I, is governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), which requires the petitioner to show: (1) that his attorney's performance at the hearing was deficient, as counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and (2) that there is a reasonable probability that, absent the errors, the sentencer would have concluded that the balance of aggravating and mitigating factors did not warrant death. *Strickland*, 466 U.S. at 687-88, 695.

The Illinois Supreme Court has recognized that in some cases the available mitigating evidence is either so flawed or potentially damaging that a competent counsel may reasonably decide not to present it, while, in another case, counsel may decide that some potentially mitigating evidence would be merely cumulative. *People v. Caballero*, 126 Ill. 2d 248, 275, 533 N.E.2d 1089 (1989). The present case fits both of these categories.

Defense counsel's decision to present mitigation testimony from petitioner himself and from one psychologist cannot be deemed unreasonable. First, petitioner cannot establish that testimony like that presented in Ms. Messner-Peters' affidavit would have been available to him at the time of his sentencing hearing. Petitioner's sentencing hearing was held in 1984. Ms. Messner-Peters did not become a licensed social worker until 1989. Moreover, the Illinois Supreme Court has recognized that mitigation experts who compile social histories like that done by Ms. Messner-Peters in the

present case were rare, if they existed at all, during the time petitioner was sentenced. *See People v. Holman*, 164 Ill. 2d 356, 371-72, 647 N.E.2d 960 (1995) (mitigation experts not available in 1985).

Nonetheless, even were such testimony available, it would have been of little or no value to the sentencer. In *Stewart v. Gramley*, 74 F.3d 132 (7th Cir. 1996), the United States Court of Appeals for the Seventh Circuit rejected the proposition that all evidence of a defendant's background mitigates guilt, that "causality is mitigation." *Stewart*, 74 F.3d at 136. The court stated:

> [S]ince it obviously is not the theory of capital punishment that murderers are compelled to murder by their past and therefore should not be punished, it cannot be right that anything brought out at a death-penalty hearing is certain or even likely to help the defendant to save his life. What is brought out that will help him is what goes to show that he is not as "bad" a person as one might have thought from the evidence in the guilt phase of the proceeding. What is brought out that will hurt him is what goes to show that he is, indeed, as bad a person, or worse, than one might have thought from just the evidence concerning the crime.

Stewart, 74 F.3d at 136. That same court later noted that "neither defense lawyers nor state courts are bound by the Constitution" to subscribe to the view that causality is mitigation. *Holman v. Gilmore*, 126 F.3d 876, 883 (7th Cir. 1997). The evidence offered here, like that reviewed in *Stewart*, "adds colorful de-

tails possibly relevant under a *tout comprendre*[1] defense if one existed, but not calculated to make a judge or jury think [the defendant] less deserving of the death penalty." *Stewart*, 74 F.3d at 137.

This Court has repeatedly described evidence such as that now offered by petitioner as a "two-edged sword." *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). As the Illinois Supreme Court observed in *People v. Franklin*, 167 Ill. 2d 1, 27, 656 N.E.2d 750 (1995), although this type of evidence may evoke compassion, it may also demonstrate petitioner's dangerousness and show that his conduct is undeterrable. *See also People v. Ward*, 154 Ill. 2d 272, 336-37, 609 N.E.2d 252 (1992) (evidence about defendant's troubled childhood is not *per se* mitigating).

In the present case, the evidence contained in the Messner-Peters affidavit is not solely mitigating; portions of it are aggravating. For example, the affidavit states:

> When he was sixteen years old, Mr. Evans forced his sister Beverly to have oral sex with him in an elevator after he stopped the elevator between floors. After Beverly reported this incident to their mother, Ms. Richardson beat John with an electrical cord and called the police. He spent one night in a juvenile detention center and was released the following day to his uncle. His mother, who wanted Mr. Evans out of the household, registered him for the Job Corps. He waited at home, with the incestual

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[1] *Tout comprendre c'est tout pardonner*—roughly translated, "to understand all is to forgive all."

> (sic) relationship between Mr. Evans and Beverly continuing, until he left for the Job Corps.

(App. 40). The affidavit further indicates that petitioner was terminated from the Job Corps program after he "defended himself from a homosexual attack by attacking the man with a knife." (App. 40). The summary of petitioner's work history indicates that petitioner quit his job at a bakery after working there for only two days "because it was too cold to work in the section where he was placed and his manager had a hateful attitude." (App. 41). When petitioner did manage to secure a job as a messenger for the First National Bank of Chicago, he was fired "due to absenteeism." (App. 42) After marrying Betty Ann Clanton Pruitt and having two children with her, petitioner and his wife "abused drugs and alcohol," petitioner used marijuana daily and reported being intoxicated throughout the day. (App. 44)

Among Ms. Messner-Peters' conclusions was that petitioner's dysfunctional childhood resulted in "increased frustration and the inability to control aggressive behaviors" and "the association of love with violence and the inability to function under stress without aggression." (App. 45) Petitioner argues that if the sentencing judge had heard this evidence, he would have found petitioner less culpable and would not have sentenced him to death. The People disagree, and submit that the above evidence would only have reinforced a finding that petitioner could not control his aggression and was a danger to society.

Moreover, the testimony petitioner now says his attorneys should have presented would have been cumulative to that which was presented at the hearing.

See generally People v. Wright, 149 Ill. 2d 36, 50-51, 594 N.E.2d 276 (1992) (counsel deemed competent although he did not obtain cumulative evidence about the petitioner's mental health and troubled youth) and *Caballero*, 126 Ill. 2d at 275 (counsel may reasonably ignore mitigating evidence that is cumulative). Here, petitioner's testimony at the sentencing hearing spans 149 pages of the transcript. Petitioner went into great detail about how he was abandoned by his mother as an infant, was not loved by anyone and was considered a burden by his caretakers, was treated as an outcast, was physically, sexually, and emotionally abused, was hospitalized several times as a child and eventually had his left eye removed, was badly beaten as a teenager and required 36 stitches in his head, and was unable to find suitable employment as an adult. Most importantly, petitioner was able to provide a first-hand explanation of his feelings about all of this.

Dr. Rosenwald described petitioner as "a person who is chronically a depressed human being who feels helpless, rejected, abandoned and unloved." (TR 2978) He explained that petitioner did not know his mother until he was 14 years old, that he was told at the age of six that nobody really wanted him, that he had been sexually abused at the age of 4 and again at the age of 14, that petitioner had never met his father and that petitioner's birth was the result of his father raping his mother. (TR 2979) He further testified that petitioner's actions were expressions of someone who is searching for some kind of relationship. (TR 2988) Dr. Rosenwald concluded that petitioner's repetitive history of rape resulted from petitioner constantly seeking to affirm his own masculinity. (TR 2990-92) He testified that peti-

tioner had "a long-standing mental disturbance, and that consequently there would be periods of time where he would be acting under extreme duress" and that "he has been chronically ill for many years." (TR 2993) Dr. Rosenwald later added that "it was highly probable that Mr. Evans was under emotional factors which could contribute to the crimes that he committed." (TR 3031) He stated that his report indicated that petitioner felt helpless because his entire life had been full of frustration, rejection, abandonment and lack of love among other trauma, and that this, coupled with petitioner's being black, rendered him "a picture of impotent despair." (TR 3040)

In light of this comprehensive analysis of petitioner's background, the testimony petitioner now claims should have been presented would have been cumulative. The trial court was well aware of petitioner's troubled childhood and the effect that it had on him. Trial counsel could have reasonably concluded that testimony from petitioner's own mouth, affirmed by a psychologist, would have been most compelling.

Likewise, trial counsel could have reasonably determined that the evidence in Dr. Girdaukas's affidavit was unnecessary. Dr. Girdaukas specifically stated that "Mr. Evans is not psychotic or retarded," but described him as having "significant and diffuse neurological impairments, probably chronic and longstanding." (App. 53) Dr. Girdaukas's affidavit indicates that petitioner's Verbal IQ was 84, "within the low average to borderline mentally retarded range of intellectual functioning," while his Performance IQ was 99, "solidly within the average range of intellectual functioning." (App. 53) Additionally, while Dr. Rosenwald testified that petitioner

suffered from a "long-standing mental disturbance," he unequivocally stated that petitioner possessed "average intelligence" and described him as a "reasonably intelligent human being." (TR 2993, 2976, 3002) Indeed, petitioner testified that he had made substantial progress toward obtaining his Bachelor of Arts degree while he was in prison. (TR 2951)

The value of Dr. Girdaukas's testimony is questionable. Dr. Girdaukas's affidavit suggests that petitioner suffers from an "organic brain impairment," (App. 55); however, the affidavit does not indicate that he performed any physical examination, such as an EEG, X-ray, CAT scan, or MRI, to confirm any organic brain impairment.

Most importantly, presentation of evidence explaining why petitioner murdered Adrian Allen would have directly contradicted petitioner's own testimony expressly denying that he committed the murder. *See United States ex rel. Kokoraleis v. Director of the Illinois Department of Corrections*, 963 F. Supp. 1473 (N.D. Ill. 1997) (rejecting ineffectiveness claim where presentation of mitigation based on mental condition would have been inconsistent with defendant's sworn denial of the offense), *aff'd*, 131 F.3d 692 (7th Cir. 1997). Here, in petitioner's statement in allocution, he expressly denied murdering Adrian Allen. (TR 2904-07, 2911, 2938, 2945)

Petitioner further fails to establish prejudice, the second prong of the *Strickland* test. The evidence in aggravation established that between March 11, 1974, and January 24, 1983, petitioner had been out of custody for a total of 71 days and during that time he had

raped or tried to rape 8 different women, including the murder victim, Adrian Allen. (TR 3053-56) Each of the surviving women provided powerful testimony at trial and sentencing. Tina Yancy, Loretta Brown, Ruby Coleman, Gail Carroll, Annie Webb, and Maeline Mitchell all gave compelling accounts of how petitioner raped them in CHA elevators. (TR 2654-62, 2915, 2625-30, 2763-76, 1934-64, 1996-2015) Diane Smith testified that the day after petitioner raped Annie Webb, he came to her apartment, brandished a knife and tried to rape her. (TR 2708-12) Finally, the jury determined beyond a reasonable doubt that petitioner killed Adrian Allen after attempting to rape her in a CHA elevator. (TR 2126-35) Sixteen-year-old Paula Banks testified that petitioner wrote her threatening letters from prison. (TR 2787-95) Additional evidence demonstrated that petitioner's prison disciplinary record was poor, (TR 2787-95, 2635-39, 2668-83), and that he did not comply with the terms of his parole. (TR 2728-34, 2751-52) Faced with such overwhelming evidence in aggravation, petitioner fails to demonstrate that the trial court would not have sentenced him to death if the testimony of Dr. Girdaukas and Ms. Messner-Peters had been presented at the sentencing hearing.

The federal cases cited in support of petitioner's argument are inapplicable here, and the distinguishing factors in those cases are quite evident—the representation afforded the defendants in those cases fell far below what petitioner received in the present case. This Court has repeatedly affirmed death sentences in cases in which defense counsel did not offer any mitigating evidence whatsoever. *See Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114 (1987); *accord*, *Darden v. Wainwright*,

477 U.S. 168, 106 S. Ct. 2464 (1986) (decision to rely on simple plea for mercy instead of mitigating evidence deemed a reasonable tactical decision).

Petitioner's trial attorneys were not required to run down every lead in mitigation, however tenuous. In *Jackson v. Roth*, 24 F.3d 1002 (7th Cir. 1994), the Seventh Circuit reviewed an ineffective assistance claim where counsel did not call additional witnesses to testify at sentencing about the defendant's childhood and good character. In determining that the habeas petitioner had not demonstrated a constitutional violation, the court noted:

> [W]e do not think that the failure was a violation of minimum professional norms. We stress "minimum." A superb lawyer would of course have left no stone unturned, at least would not have left this stone unturned. Criminal defendants are not entitled, however, at least by the federal Constitution, to superb lawyers. Lawyers who are not superb do not always pursue low-probability avenues for helping their client even when high-probability ones are nonexistent . . . . [W]e do not think that the Constitution requires criminal lawyers to pursue low-probability prospects for acquitting their clients or getting the clients' sentences reduced.

Jackson, 24 F.3d at 1005. In the context of a capital sentencing hearing, an attorney has rendered reasonably competent assistance so long as he has portrayed his client as a "uniquely individual human being" to facilitate an individualized sentencing determination and provide the sentencer with a basis for imposing a penalty less than death. *See generally Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978 (1976).

Compare Kubat v. Thieret, 867 F.2d 557 (7th Cir. 1989) (cited in the Petition) (where defense counsel failed to present cohesive plea for mercy in closing and failed to present mitigation; his argument was "a rambling, incoherent discourse . . . that may actually have strengthened the jury's resolve to impose a death sentence," reviewing court found that representation at sentencing "amounted to no representation at all" since no effort was made to present defendant to the jury as a human being.)

Here, trial counsel tried to portray petitioner as abused, unwanted and unloved by his own family. He presented expert testimony in an effort to explain why petitioner's background would lead him to commit such a brutal and heinous act upon an innocent sixteen-year-old girl. Nevertheless, even if this evidence attempted to explain the reason for petitioner's inhuman actions, it did not excuse them. The trial court did not find such evidence to be sufficient to preclude what he believed to be the proper sentence: death.

In sum, petitioner failed to make a substantial showing of a violation of some constitutional right, supported by the record or affidavits filed with his petition, sufficient to warrant an evidentiary hearing on his post-conviction claims. Because petitioner failed to satisfy the *Strickland* test applicable to claims of ineffective assistance of counsel, the Illinois Supreme Court properly affirmed the dismissal of petitioner's post-conviction petition without an evidentiary hearing. Petitioner has not demonstrated any reason for this Court to review this case. Accordingly, the Petition for a Writ of Certiorari should be denied.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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